**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Telecommunications Services | ) | CS Docket No. 95-184 |
| Inside Wiring | ) | |
| | ) | |
| Customer Premises Equipment | ) | |

To: The Commission



# COMMENTS OF OPTEL, INC.

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## SUMMARY

First, the Commission has sought comment on whether it should adopt rules requiring mandatory access to MDUs to achieve "access parity" between LECs and franchised cable operators. For OpTel, this is the overriding issue in the proceeding. There is little doubt that requiring MDU owners to open their property to all service providers would constitute a *per se* taking. It is open to serious question whether the Commission has statutory authority to compel such a *per se* taking of private property.

Moreover, as a policy matter, mandatory access rules inadvertently could foreclose the MDU market to new entrants and create a duopoly of LECs and franchised cable operators. Unless new entrants are permitted to contract for exclusive access, particularly to provide multichannel video services in a MDU, they will not make the substantial investment that is required to wire MDUs with state-of-the-art facilities. Consumers, therefore, will be deprived of truly competitive service offerings from a diverse mix of service providers.

Second, OpTel urges the Commission to move the cable demarcation point in non-loop-through MDUs to the point at which the individual subscriber's wires can be detached from the cable operator's common wires without damaging the MDU and without disrupting service to other customers (*i.e.*, the "separate wire"). In most cases, the current demarcation point for cable inside wiring provides essentially no access for alternative providers to cable inside wiring in MDUs and it thereby stifles competition.

Third, the Commission should deem MDU owners as the relevant subscribers in MDUs comprised of rental units and allow them to purchase cable inside wiring. Such an interpretation of an ambiguous statutory term is fully within the Commission's authority and will better satisfy congressional intent.

Fourth, OpTel urges the Commission to modify its telephone demarcation point in so far as it is necessary to ensure that the demarcation point actually is made the minimum point of entry into MDUs, as determined by the MDU owner.

Finally, to the extent that the cable signal leakage rules are made applicable to non-franchised systems, the Commission should tailor the signal leakage rules to the facilities and MDU operating conditions of private cable and not simply apply inappropriate technical standards developed for traditional franchised cable system.

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To: The Commission

## COMMENTS OF OPTEL, INC.

OpTel, Inc. ("OpTel"), submits these comments in response to the Notice of Proposed Rulemaking (the "Notice") in the above-referenced proceeding. OpTel, through its subsidiaries, operates private cable/telecommunications systems and franchised cable systems in several major U.S. cities.

## INTRODUCTION

In many of its systems, in response to the demands of the property owners with whom it contracts, OpTel is, or will be, providing both telephony and video services over its systems in the residential multiple dwelling unit ("MDU") market. MDUs offer high subscriber concentrations and, therefore, new entrants often focus their efforts on service to MDUs to gain a toehold in the larger market. As a result, even in today's highly concentrated local telephone and video programming distribution markets, new entrants, such as OpTel, are offering competitive choices to consumers in MDUs throughout the U.S.

This places OpTel in unequal competition with two dominant service providers in two distinct service markets: The incumbent local exchange carrier ("LEC"), which has a *de jure* monopoly in the local telephone market; and the franchised cable operator, which has a *de facto* monopoly in the local multichannel video programming distribution market.[1]

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[1] "The MVPD market today is effectively a series of local monopolies controlled by cable television companies." In re Revision of Rules and Policies for the Direct Broadcast Satellite Service, IB Docket No. 95-168, PP Docket No. 93-253, Comments of the United States Department of Justice at 2 (filed Nov. 20,

As the technological and regulatory barriers between these two previously distinct markets fall, the Commission is confronted with the difficult task of establishing a regulatory framework that will allow incumbent LECs and franchised cable operators to compete with each other, while simultaneously promoting the development of competition from other sources. The Notice is an important step toward the development of this new regulatory scheme. The Commission's efforts in this regard will, in large part, determine whether the future "converged" telecommunications market is characterized by vigorous competition among multiple service providers or by a duopoly of the dominant LEC and the dominant franchised cable operator.

Among other issues, the Commission has sought comment on whether it should adopt rules requiring mandatory access to MDUs to achieve "access parity" between LECs and franchised cable operators. For OpTel, this is the overriding issue in the proceeding. As a legal matter, it is doubtful that the Commission has statutory authority to support such an unwarranted "taking" of the property owners' rights to enter into exclusive arrangements regarding his or her property. As a policy matter, mandatory access rules inadvertently could foreclose the MDU market to new entrants and create a duopoly of LECs and franchised cable operators.

Unless new entrants are permitted to contract for exclusive access, particularly to provide multichannel video services in a MDU, they will not make the substantial investment that is required to wire MDUs with state-of-the-art facilities. Consumers, therefore, will be deprived of truly competitive service offerings from a diverse mix of service providers. Mandatory access requirements also would deprive property owners of one of the most important tools that they have to compete for residents in the highly competitive MDU real estate market.

These issues are discussed below, along with other aspects of the Notice that will have potentially important ramifications for the development of competition in the future, "converged" telecommunications marketplace.

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1995); see also In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, ("Second Annual Report") CS Docket No. 95-61, ¶ 215 (rel. Dec. 11, 1995) ("In most local markets, a single cable system remains the primary distributor of multichannel video programming services.").

## DISCUSSION

### I. MANDATORY ACCESS REQUIREMENTS WOULD INHIBIT THE DELIVERY OF ADVANCED TELECOMMUNICATIONS SERVICES TO MDUS.

In the Notice, the Commission has initiated a review of the rights of various service providers to obtain access to MDUs and other private property. The Commission seeks "access parity" among these various providers to help ensure a "level playing field" in the emerging telecommunications market. One possibility raised by the Commission is the establishment of "mandatory access," which would expand the scope of current easements and require property owners to open their property to any number of service providers. OpTel strongly opposes Commission-imposed mandatory access requirements on both legal and policy grounds.

#### A. Mandatory Access Raises Significant Constitutional "Takings" Concerns And The Commission Likely Has No Authority To Mandate Such Access.

Any "permanent physical occupation [of private property] authorized by the government is a taking without regard to the public interests that it may serve."[2] This includes the occupation of an easement over property.[3] "The rationale for the *per se* rule is that actual occupation of property obviates an in-depth factual inquiry to determine whether one's economic interests have been sufficiently damaged as to warrant compensation."[4] Indeed, those states that currently mandate cable access generally also provide specific mechanisms for compensation.[5] Thus, there is little doubt that requiring MDU owners to open their property to all service providers would intrude upon this fundamental interest and constitute a *per se* taking.

It is open to serious question whether the Commission has statutory authority to compel such a *per se* taking of private property. In the Notice, the Commission has not identified any specific source of authority for a mandatory access rules. Nor is one apparent. Indeed, based on the legislative history of the last three major amendments to

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[2] Loretto v. Telepromtper Manhattan CATV Corp., 458 U.S. 419, 426, 435 (1982)(the right to exclude others "has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); see also Yee v. Escondido, 112 S. Ct. 1522, 1526 (1992).

[3] See, e.g., United States v. Causby, 328 U.S. 256, 265 (1946); Plymouth Co. v. United States, 260 U.S. 327 (1922); cf. Western Union Telegraph Co. v. Pennsylvania R. Co. 195 U.S. 540, 570 (1904) (the right-of-way "cannot be appropriated in whole or in part except upon payment of compensation) (quoted in Loretto, 458 U.S. at 430).

[4] Nixon v. United States, 978 F.2d 1269, 1284 (D.C. Cir. 1992).

[5] See, e.g., N.Y. Exec. L. § 16-333a(e)-(h).

the Communications Act, the Congress has rejected the very notion of cable mandatory access that the Commission now contemplates in the Notice.

Section 633 of the House version of what later became the Cable Act of 1984 included a provision that required MDU owners to provide access to franchised cable operators for the installation of cable facilities.[6] Before passage, however, these provisions were omitted from the bill largely, it appears, so that private property owners could retain the right to determine who would provide service on their property.[7] In 1992, of course, Congress passed the Cable Television Consumer Protection and Competition Act, which substantially overhauled Title VI. Nonetheless, no change was made to implement any form of mandatory access. Similarly, the Telecommunications Act of 1996 left intact the current regulatory regime in this respect.

Without an express grant of authority, the Commission would be required to rely on implied authority pursuant to its general powers were it to require, as a regulatory matter, mandatory access to private property. However, as the D.C. Circuit held in refusing to defer to the Commission's broad interpretation of its statutory power to order physical collocation for competitive access providers, "deference to agency action that creates a broad class of takings claims ... would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen."[8]

The taking of the "right to exclude" in this case by requiring property owners to open their property to various telecommunications service providers would create a "broad class of takings claims" by MDU owners potentially worth, in the aggregate, hundreds of millions of dollars. Although the physical occupation of the property might not be extensive, recent decisions indicate that courts will consider the actual economic value of the property taken when affixing the level of compensation required for a taking.[9]

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6 See H.R. 4103, § 633, 98th Cong., 2d Sess. (1984). The House bill also contained an express provision for the payment of compensation for such takings.

7 See Cable Investments v. Woolley, 867 F.2d 151, 156 (3d Cir. 1989) (discussing legislative history of former Section 633).

8 Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

9 See, e.g., NRG Co. v. United States, 31 Cl. Ct. 659 (1994) ("to be faithful to the precepts of the Fifth Amendment, it is crucial that ... this court employ a methodology that is designed .... to compensate property owners for the economic harm suffered as a result of the government's [action]."); Paul v. United States, 21 Cl. Ct. 415 (1990) ("the actual market circumstances and economic realities prevailing immediately prior to condemnation are what determine value."); cf. Nixon, 978 F.2d at 1286 ("The test [for a taking] must be whether the access rights preserve for the former owner the essential economic use of the surrendered property. That is, has the former owner been deprived of a definable unit of economic

In this case, Commission-mandated access for any and all service providers would substantially detract from the economic value of the property by taking the property owner's right to sell an easement to provide, not only single services, but all telecommunications services to the owner's MDU.[10] This property right can be worth hundreds of thousands of dollars, in some cases, for a single MDU, all of which would be compensable, under the Tucker Act, from the U.S. Treasury.[11] In the absence of clear statutory authority, the Commission's action would exceed the scope of its powers.

### B. Mandatory Access Would Benefit The Two Dominant Players In The Local Communications Market But Would Slow The Development Of Full Competition.

#### 1. State access rules favor LECs and franchised cable operators.

In the Notice, the Commission has asked for a summary of the current "legal and practical impediments faced by telecommunications service providers in gaining access to subscribers."[12] Incumbent LECs typically have extensive access to private property, either through private easements or by virtue of statutory eminent domain power. Franchised cable operators also have mandatory access rights to private property in several states.[13] New entrants, however, generally cannot gain access to private property by legal compulsion.

On the video programming side, state mandatory access laws, uniformly, benefit only franchised cable operators.[14] DBS, wireless cable, SMATV, private cable systems, and other new competitors in the MVPD market have no legal access right to MDUs. Similarly, new entrants into the local telephone markets often provide shared tenant services or other non-common carrier services that would entitle them to employ state

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interests? If so, then it is no answer that he may still stand in some relation to the property. In the present case, the right of access retained by Mr. Nixon is but a thin reed among those associated with the ownership of presidential papers. Although he may still use them ... he has lost all bargaining power with respect to them, not to mention the right to dispose of them.").

[10] Thus, whether a single wire is used or several, it is the taking of economic value that is important, not the actual space occupied by the wires.

[11] 28 U.S.C. § 1491(a). The Tucker Act remedy is available for government takings unless Congress has explicitly foreclosed it. Preseault v. ICC, 494 U.S. 1, 11 (1990).

[12] Notice ¶ 61.

[13] See Notice ¶ 60 (listing thirteen states that have some form of cable mandatory access law). See, e.g., Ill. Rev. Stat. ch. 65 § 5/11-42-11.1; N.J.S.A. § 48:5A-49; N.Y. Exec. L. § 828; Conn. Gen. Stat. § 16-333a.

[14] See, e.g., Ill. Rev. Stat. ch. 65 § 5/11-42-11.1; N.J.S.A. § 48:5A-49; N.Y. Exec. L. § 828; Conn. Gen. Stat. § 16-333a.

eminent domain powers. Thus, ironically, the "legal" imbalance in access is weighted in favor of the two dominant players in two highly concentrated markets.[15]

This imbalance creates an additional barrier to entry to new competitors, which gain access to private property only by convincing the property owner that the value of the new entrant's services warrant access. In states in which cable operators are not entitled to mandatory access ("non-access states"), this requires simply that the alternative video programming distributor demonstrate that its services are superior in quality or price (or both) to those of the franchised cable operator. Normally, MDU owners impose stringent system and hardware requirements upon alternative providers seeking to supplant the franchised operator. In any event, the victor in this head-to-head competition typically enters into an exclusive right-of-entry agreement for some period of years to recoup the investment that it will make in the MDU in question.

In states in which franchised cable operators are entitled to mandatory access ("access states"), however, there is an extra cost to the property owner that skews the competition in favor of the cable operator. In such access states, if the MDU owner were to allow the alternative provider on the premises, either the cable operator or the alternative provider, and probably both depending upon the demarcation point, would be required to overbuild at least in some parts of the MDU. Thus, in access states, alternative providers not only must convince property owners of the superiority of their service, but also that the service is so far superior to that of the franchised cable operator that it warrants the disruption of an overbuild. These states, in effect, raise the bar for alternative service providers to gain access to MDUs.

**2. Mandatory access would slow the development of full competition.**

Despite their superficial appeal as a mechanism for achieving parity of access, given the relative market power of those seeking access to MDUs and the benefits of preserving the property owner's rights *vis a vis* those seeking such access, mandatory access regulations would skew the market in favor of the dominant service providers and deprive property owners of a needed right in the competition for MDU residents. OpTel opposes any expansion of the easements currently held by the incumbent LECs and the franchised cable operators.

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[15] Compare 47 U.S.C. § 548 (with respect to program access, the Congress sought to ensure that new entrants would get a toehold in the market by mandating access).

First, the economics of the MDU marketplace favor the use of exclusive service agreements. *De facto* exclusive franchising of cable systems occurs because of the "extraordinary expense of constructing more than one cable television system to serve a particular geographic area."[16] For similar reasons, exclusive access agreements are the norm at MDUs, both for franchised cable operators and alternative service providers such as OpTel. The small subscriber base at any one MDU limits the potential return on investment and makes it commercially impractical for more than one provider to wire most MDUs.

This limitation is particularly important for private cable systems, which must install and maintain an entire distribution network, including satellite or microwave reception equipment, at each property to be served. Whereas a franchised cable operator can amortize the cost of serving an MDU over its entire franchise area, private cable operators are required to recoup their investment through each MDU served. Thus, exclusivity is essential to the ability of OpTel and other alternative video programming distributors to compete. Any Commission prohibition on exclusive rights-of-entry significantly would impair the development of competition in the MVPD market.

Second, exclusive rights-of-entry provide important consumer benefits. The availability of exclusive rights-of-entry or "broadband easements" allows landlords to bargain with service providers for the best telecommunications services and products available. Landlords can require service providers to make a significant investment in the technology and services for the MDU because they can guaranty access to a stable supply of customers over a long period of time. Service providers will install the state-of-the-art facilities because the right-of-entry agreement permits them to recover their investment over time and earn a reasonable rate of return. Residents of the MDUs benefit by having access to top quality communications and multichannel video services.[17] Exclusive rights-of entry, therefore, are a win-win-win proposition. Without them, market forces will dictate that the minimum competitive level of technology will be used at most MDUs and residents will lose the leverage of concerted action to obtain lower rates and/or customized services.

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16 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(2).

17 OpTel agreements provide that the wiring installed by OpTel becomes the property of the MDU at the end of its contract term, and further provide that other elements of the system may be purchased at fair market value to ensure service continuity.

### C. To Ensure that Competitive Access To MDUs Is Not Foreclosed In Perpetuity, The Commission Should Prohibit Service Contracts That Run For The Life Of The Operator's Franchise And Renewals Thereof.

Although exclusive contracts with the owners of MDUs are a reasonable business practice, given the capital investment required to install state-of-the-art technologies in an MDU, there is no reasonable business need for those exclusive contracts to be perpetual. Franchised cable operators use such perpetual contracts only to foreclose the MDU to competing service providers. In order for competition to flourish, consumers should be allowed to switch to competitive providers, once they are able to offer service in the MDU

Perpetual contracts are being used by franchised cable operators across the country. For example, it is common practice for franchised cable system operators to require MDU owners wishing to receive cable service to enter into an agreement providing that the franchised operator will be the exclusive provider of video services in the MDU "for a period equal to the term of the franchise granted to the Operator by the franchising authority, and any extension or renewal thereof. " Since franchising agreements typically run from 10-25 years, and since franchises generally are renewed and extended, these exclusive contracts are, in effect, perpetual.

One simple, but effective, guard against the misuse of exclusive rights-of-entry would be a prohibition on video service contracts that are of essentially unlimited duration. To that end, the Commission should require that all future right-of-entry agreements between franchised operators and property owners include a specific term of years during which the agreement will be in force. Agreements lacking a specific term of years which already are in effect should be required to terminate at the end of the operator's current franchise term. Such a restriction on perpetual exclusive rights-of-entry would achieve the Commission's goal of ensuring that subscribers periodically may reevaluate their choice of service provider without undermining the economic incentives to provide the highest quality telecommunications products and services to residents of MDUs.

### D. If the Commission Determines That It Does Have Authority To Require Mandatory Access, It Should Require Such Access Only For Service Providers That Face Effective Competition.

To ease the transition to a competitive market and allow market forces to supplant regulation whenever possible, Congress has provided that the cable rate regulation provisions of the Communications Act sunset for any cable system that is

subject to "effective competition."[18] A similar construct should be used for any mandatory access provisions that the Commission adopts.

As set forth above, current mandatory access rules favor the two dominant service providers in the local communications markets — incumbent LECs and franchised cable operators. If the Commission determines that a mandatory access rule would not constitute an impermissible taking, it should require mandatory access only for service providers that do not have market power either in the local exchange or in video programming distribution markets. Such a distinction between service providers that have market power and those that do not would serve the Commission's goals of creating access parity and leveling the competitive playing field. In effect, the Commission should establish an "effective competition" test to determine which competitors should be given the benefit of a mandatory access rule. Only when they face effective competition should the current monopolists be permitted to benefit from any federal mandatory access requirement.

## II. THE CABLE SYSTEM DEMARCATION POINT SHOULD BE MOVED, IN MDUS, TO THE POINT AT WHICH THE BROADBAND LINE BECOMES DEDICATED TO AN INDIVIDUAL SUBSCRIBER'S USE (*I.E.*, THE "SEPARATE WIRE").

Restrictions on access to cable inside wiring in MDUs make it extremely impractical, and in some cases impossible, for alternative providers of video programming to compete for subscribers in MDUs. In the 1992 Cable Act, Congress sought to provide alternative video programming providers with access to existing cable inside wiring.[19] Effective access to cable inside wiring, Congress determined, would allow subscribers to switch from a cable operator to a competing video programming provider without undue delay or disruption of service.[20]

In its order implementing this aspect of the 1992 Cable Act, the Commission defined cable inside wiring as "wiring located within the premises or dwelling unit of the subscriber" and established the "demarcation point" in MDUs "at (or about) twelve inches outside of where the cable wire enters the outside wall of the subscriber's individual

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18 47 C.F.R. § 543(a)(2).

19 See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Sections 2(a)(6), 2(b)(1-2), 106 Stat. 1460 (1992).

20 Id.; see also H.R. Rep. No. 628, 102d Cong., 2d Sess. at 118 (1992); S. Rep. No. 92, 102d Cong., 1st Sess. at 23 (1991).

dwelling unit."[21] As the Commission has come to realize, this definition of the demarcation point does not provide alternative video programming providers with effective access to a subscriber's existing cable wiring.[22]

In the Notice, the Commission has asked whether the current demarcation points give reasonable access to service providers and whether a common demarcation point should be established.[23] As described in its comments to the Notice of Proposed Rulemaking in MM Docket No. 92-260, OpTel urges the Commission to move the demarcation point in MDUs with loop-through wiring to a point 12 inches outside of the minimum point of entry into the MDU.[24]

In most cases, a demarcation point for cable inside wiring twelve inches outside of the subscriber's premises will provide essentially no access for alternative providers to cable inside wiring in MDUs. Although some new MDUs allow for access to cable wiring near the door of each individual unit, the vast majority of older MDUs have no such access. Wire located within twelve inches of a subscriber's premises may be buried in load-bearing walls or concealed in conduit and, therefore, not readily accessible without causing substantial damage to the building or the subscriber's apartment.

Moreover, in order to effectuate Congressional intent and provide practical access to cable inside wiring in MDUs, the demarcation point in non-loop-through MDUs should be the point at which the individual subscriber's wires can be detached from the cable operator's common wires without damaging the MDU and without disrupting service to other customers (*i.e.*, the "separate wire").[25]

In view of the technological characteristics of broadband wiring, the "separate wire" demarcation point generally would be closer to each subscriber's unit than is the telephone demarcation point, which normally is at the minimum point of entry in

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21 Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Cable Home Wiring, 8 FCC Rcd 1435, ¶ 12 (rel. Feb. 2, 1993).

22 See Notice ¶ 17.

23 Notice ¶¶ 12-19.

24 In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, MM Docket No. 92-260 (rel. Jan. 26, 1996), comments of OpTel (filed March 18, 1996).

25 Although the inside wiring termination procedures only apply by their terms to "cable systems," OpTel generally abandons all broadband wire that it installs in MDUs at the termination of its right-of-entry agreements. In addition, OpTel's agreements often provide that other elements of its systems are sold at fair market value to the MDU at the termination of the contract period.

MDUs.[26] This difference, however, is merely a function of the technology. As a legal matter, both the telephone demarcation point and the cable "separate wire" demarcation point advocated by OpTel would be at the point at which the line becomes dedicated to an individual unit. In this way, the Commission would "harmonize" the cable and telephone rules for regulatory purposes.[27]

In addition, the proposed "separate wire" demarcation point for cable wire will best meet the Commission's goal of promoting the development of a competitive MVPD market. By allowing cable customers access all of the separate wire, a change of service provider will be accomplished much more easily. In MDUs in which there is no exclusive service provider, the subscribers will have a better opportunity to connect their dedicated line with the common wiring of whichever service provider they choose. Further, at MDUs which do negotiate for an exclusive right-of-entry agreement with a new service provider, such new provider will not be required to engage in extensive demolition and reconstruction in the MDU to reach every unit. The cable "separate wire" demarcation point will promote competition and enhance consumer choice.

The proposed cable "separate wire" demarcation point also is consistent with the Commission's statutory authority. Under the Communications Act, the Commission is required to "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber."[28] Although the Cable Act does not define the term "premises," the legislative history indicates that the term was not meant to include common areas within an MDU. Nonetheless, there is no reason to believe that a dedicated line should be regarded as part of the MDU commons. Indeed, because separate wire is dedicated to a single unit, it is the antithesis of a common line and is, for all intents and purposes, an extension of the individual unit. It is, therefore, fully within the Commission's authority to establish a demarcation point in non-loop-through MDUs such that the entire subscriber dedicated line would constitute inside wiring.

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26 See 47 C.F.R. § 68.3.

27 Because of economic and technical considerations (*i.e.*, signal loss with distance and the difficulty of bundling coaxial cable), it is unlikely that cable operators would configure their systems to move the "separate wire" demarcation point far from subscriber units. Thus, the Commission need not be concerned about subscriber maintenance of cable amplifiers on individual lines. In addition, there appears to be no basis at this time for a change in the level of compensation provided to cable systems for the loss of their inside wiring.

28 47 U.S.C. § 544(i).

## III. OWNERS OF MDUS COMPRISED OF RENTAL UNITS SHOULD BE ALLOWED TO PURCHASE CABLE INSIDE WIRING.

Although the Notice asks several broad questions regarding the appropriate disposition of cable inside wiring in MDUs upon service termination, it nowhere explicitly draws the important distinction between rental apartment buildings and other types of MDUs such as cooperative apartments or condominiums.

It is important that the Commission's inside wiring rules account for the practical differences between these types of MDUs. For instance, rental apartment tenants generally are more transient and have less of a financial interest in the subject MDU than do the residents of the other types of MDUs. Thus, rental apartment tenants may have little interest in maintaining the MDU common areas or in enhancing the service options available to future tenants of the building. Condominium residents, on the other hand, are responsible for, and have property rights in, the common areas of their buildings. They also typically share in the management of their buildings through owner associations. Hence, the Commission's inside wiring rules must be carefully tailored to balance the interests of residents, property owners, service providers, and the competitive health of the market for telecommunications and video distribution services in each of these contexts.

To give full effect to the inside wiring rules, the Commission should deem MDU owners as the relevant subscribers in MDUs comprised of rental units, for inside wiring purposes, and allow them to purchase cable inside wiring. Such an interpretation of an ambiguous statutory term is fully within the Commission's authority and will better satisfy congressional intent.

Ordinarily, rental apartment tenants vacate their unit within a very short time following the expiration of the lease. At that point, the tenant has no interest in acquiring the cable inside wiring. The tenant will not be remaining at the unit to use the wire in connection with the services of another video programming distributor and, presumably, there is no advantage to removing the wiring for use at the tenant's next residence. Thus, the tenant in this context almost certainly will not exercise any right to purchase the cable inside wiring conferred by the Commission's rules. Similarly, if a tenant terminates service without leaving the building, the tenant still has no financial stake in the long term service options available at the building that would motivate the tenant to purchase the cable inside wiring.

In addition, under most state fixture laws and under typical rental leases, wiring that is inside of a wall or affixed to a wall is deemed a fixture, which the tenant will be required to leave upon vacation of the premises. Thus, absent some independent agreement with the MDU owner or an alternative video service provider, the renter will never recover the purchase price of the inside wiring. Consequently, the wiring in MDUs comprised of rental units most often remains the property of the cable company and each consecutive new tenant is, initially at least, a captive subscriber.

The MDU owner, by contrast, has a long term interest in the building and the services available to it. The owners of rental apartment buildings must compete for tenants in the fiercely competitive residential real estate market. The quality of the telecommunications and video services available on the property is one factor on which they compete. In this context, therefore, the long term interests of the residents of a rental apartment MDU are better served by a rule that vests the owner of the MDU with control over the wiring and broadband services in the building.

For that reason, MDU owners should be given the option to acquire cable inside wiring in rental apartment buildings when a tenant or the entire building terminates service.[29] Once the MDU owner has such ownership and control over the inside wiring, new tenants easily can be connected for service from the previous provider or, where an alternative service provider has installed a common wire in the building, the new service provider can be given easy access to the residents without undue delay.[30]

## IV. THE COMMISSION SHOULD REAFFIRM ITS RULE THAT THE TELEPHONE DEMARCATION POINT SHOULD BE AT THE MINIMUM POINT OF ENTRY IN MDUS.

In the Notice, the Commission seeks comment on the "effect of changing the telephone network demarcation point to mirror the cable demarcation point (*i.e.*, at or about 12 inches outside of the point at which the cable wire enters the subscriber's

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[29] *MDU owner control of cable inside wiring in rental apartment buildings also will help to mitigate safety concerns. In rental MDUs, the property owner remains responsible for maintenance of the common areas and for building security. If tenants are given access to cable inside wiring, it will be more difficult for property owners to ensure the proper installation and maintenance of that wire, and to control access to the building by service provider personnel.*

[30] The proposed change in the rules should make no meaningful difference to the incumbent provider. Once termination has occurred, the incumbent will not be providing service to the subscribers and the balance of the drop is useless to them. Conversely, the drop wiring is extremely valuable to the competitor that will be providing service to the unit.

premises.)."[31] Because such a change would further inhibit the growth of competition in telecommunications services provided to MDUs, OpTel opposes such a change.

Further, although the current telephone demarcation point, which allows LECs to establish a standard procedure of placing the demarcation point at the minimum point of entry,[32] balances the interests of consumers and carriers while protecting the public network, it is, in practice, largely ignored by LECs seeking to inhibit competitive access to MDUs. OpTel urges the Commission, therefore, to modify its telephone demarcation point in so far as it is necessary to ensure that the telephone demarcation point actually is made the minimum point of entry into MDUs, as determined by the MDU owner.

When the Commission revised its definition of the telephone demarcation point in 1990, it sought to establish a demarcation point for MDUs that was "sufficiently flexible to accommodate" existing wiring configurations while encouraging carriers to fix a demarcation point that would advance the Commission's pro-competitive goals.[33] Thus, the Commission grandfathered existing MDUs in which the demarcation point had been set in accordance with a carrier's reasonable and nondiscriminatory standard practice.[34] For new MDUs, including those in which existing wire has been modified since August 13, 1990, the Commission provided that carriers could establish a reasonable and nondiscriminatory practice of placing the demarcation point at the minimum point of entry into the MDU (either where the wire entered the building or where the wire crosses the property line).[35] Where LECs do not establish such a practice, MDU owners are entitled to determine the location of the demarcation point.[36]

Despite the clear intent of the rule, certain LECs have attempted to maintain demarcation points in MDUs at individual units rather than the minimum point of entry. LECs have resisted the expansion of telephone inside wiring that should have resulted from the Commission's 1990 rule revisions. They do so by arguing that a particular MDU's wiring has existed in its present state since prior to August of 1990, or

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31 Notice ¶ 16.

32 See Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, 5 FCC Rcd 4686 (1990).

33 Id. at 4693.

34 Id.

35 Id. The Commission noted in its decision that the "revised definition of the demarcation point for [MDUs] permits, but does not require, that the demarcation point be at the minimum point of entry. The Commission may later explore whether the public interest requires that the demarcation point in [MDUs], both new and existing, be at the minimum point of entry." Id. at n.30.

36 Id.

by failing to establish a practice of setting the demarcation point at the minimum point of entry and denying the owners the right to establish a demarcation point at such point of entry. Today, without any basis in law, many LECs continue to maintain as a blanket policy that the telephone demarcation point in the MDUs they serve is at the first jack in each individual unit.

LEC resistance in placing the telephone demarcation point at the minimum point of entry in MDUs is nothing more than anticompetitive behavior hiding behind a claimed regulatory ambiguity. LEC resistance has made it very difficult for alternative providers to compete for telephone service in these buildings for many of the same reasons that the current cable demarcation point discourages competition in video programming distribution. OpTel, therefore, urges the Commission to modify its telephone demarcation point, not by making it closer to the current cable demarcation point, but by stating explicitly that LECs are required to place the telephone demarcation point in MDUs, both new and existing, at the minimum point of entry.

In addition, because MDU property owners have, in most cases, invested substantial sums of money in providing for communications access rooms consistent with the structural and aesthetic characteristics of their buildings, and because of tenant security, service provider convenience, and MDU owner liability for persons on their property, MDU owners should be given the discretion to determine the location of such a minimum point of entry.[37]

By modifying its rules as suggested above, the Commission would greatly enhance the growth and development of competition at the local exchange level in MDUs. Given the current lack of access to LEC wiring, many would-be competitors have been discouraged from entering the market, since it simply is too burdensome to a new entrant to rewire entire MDUs in order to provide service. Moreover, MDU owners resist changing providers when the new service provider will be required to

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[37] OpTel suggests specifically that the Commission's rule be modified to read as follows: "For multiunit premises, the telephone company shall establish the demarcation point at the minimum point of entry upon the property owner's request. The telephone company shall not charge the property owner for the location or relocation of the demarcation point or for using any wiring on the property owner's side of the demarcation point. The property owner has the right to designate single or multiple demarcation points, regardless of whether the multiunit premises is a multi story building or whether a building or buildings are separated by a right of way, easement, or thoroughfare. The Minimum Point of Entry shall be, as determined by the property owner, the closest practicable point to where the wiring crosses a property line, the closest practicable point to where the wiring enters a multiunit building or buildings, or any other location requested by the property owner on his premises."

break into interior walls and conduits in order to reach individual units within the building. New entrants that do seek to challenge obstructionist LECs are compelled to litigate, on a state by state basis, for access to the telephone inside wiring.[38] This process is, of course, exceedingly time consuming and costly and, therefore, it chills competition.

If LEC wiring were limited to the least invasive point on the property (the minimum point of entry, as defined by the MDU owner), alternative providers could compete for service contracts with the expectation of having practical access to the individual units in the each MDU. In addition, property owners would have greater bargaining power *vis a vis* service providers if they could guarantee such access, which could be used to obtain lower cost, customized services for the residents of the MDU. Thus, by clearly and firmly establishing the telephone demarcation point in MDUs at the minimum point of entry, the Commission would foster all of the familiar benefits of competition.

## V. TO THE EXTENT THAT THE CABLE SIGNAL LEAKAGE STANDARDS ARE MADE APPLICABLE TO NON-FRANCHISED CABLE SYSTEMS, THOSE RULES SHOULD BE TAILORED TO THE TECHNICAL CHARACTERISTICS OF THE SERVICE PROVIDER'S SYSTEM.

In the Notice, the Commission has asked whether its cable signal leakage rules, which currently are applicable only to "cable systems," should apply to all providers of broadband services.[39] As a factual matter, cable signal leakage has not been a significant problem for OpTel's systems. On a cost-benefit basis, therefore, the suggested extension of the cable signal leakage rules would appear to create regulatory inefficiencies where none now exist. Nonetheless, as the lines between franchised cable operators and other broadband service providers become blurred, regulatory distinctions based upon these lines become less coherent. OpTel concurs, therefore, with the Commission's tentative conclusion that the cable signal leakage standards should apply to all broadband service providers, whether or not they operate "cable systems" as the term is defined the Communications Act and the Commission's rules.

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[38] To further increase competitive access to MDUs, the Commission should provide an express complaint procedure, at the federal level, for telephone inside wiring complaints. This would obviate the filing and prosecution of numerous individual cases in each state in which a competitive provider seeks to provide service.

[39] Notice ¶¶ 24-25.

The Commission, however, must tailor the signal leakage rules to the facilities and MDU operating conditions of private cable and not simply apply inappropriate technical standards developed for traditional franchised cable system. Both the measurement techniques and the performance criteria presently set out in the rules are based on traditional cable trunk and feeder construction with substantial linear feet of cable. These rules should not apply to widely separated private cable systems, served by microwave systems and containing only modest cable strands. This distinction is logical — as the cabled size of a cable system increases the risks of signal leakage increase correspondingly.

In order to qualify as private cable systems, rather than franchised cable systems, under the Commission's rules, private cable systems frequently use microwave links to connect to a headend site and avoid hardwired crossings of public rights-of-way. A single headend may serve many separate private cable systems in geographically distant parts of a metropolitan area. Thus, although a single headend may serve several thousand subscribers via microwave link to multiple private cable systems, the individual systems are separated by long uncabled distances. Each may serve no more than a few hundred subscribers. These individual private cable systems pose relatively insignificant risks of signal leakage, since they use relatively modest broadband networks within each system from which leakage may occur.[40]

Therefore, once the Commission develops measurement techniques more appropriate for private cable operating in MDUs, the private cable signal leakage performance criteria should be applied to a sampling of at least 75 percent of the cable strand per head end or per microwave receive site, whichever is less. Such a rule would be entirely consistent with the Commission's prior practices and policies.[41]

OpTel also recommends that a transition period be established during which private cable operators would be allowed to bring all existing systems into full compliance with applicable signal leakage rules. Given that the rules have not previously been applied to non-franchised operators and the relatively high cost of

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[40] Franchised cable operators are permitted to interconnect separate franchised systems with CARS band microwave under Part 78. These separate systems are not required to be deemed a single system for cable signal leakage purposes. The private cable application of 18 GHz microwave under Part 94 is directly analogous to the CARS band application. Cable strand in separate private cable systems interconnected via 18 GHz microwave should not, therefore, be aggregated.

[41] See 47 C.F.R. §§ 76.601(e); 76.611; 76.614.

compliance, equity requires that such alternative video programming distributors are afforded a reasonable time within which to upgrade their existing systems.

## VI. THERE SHOULD NOT BE A PRESUMPTION OF SUBSCRIBER OWNERSHIP OF BROADBAND WIRING.

To help to effectuate its proposed new subscriber access rules, the Commission has asked whether it should create a presumption that subscribers own their cable inside wiring.[42] OpTel opposes the establishment of such a presumption.

To begin with, it is clear that any such presumption cannot be irrebuttable without raising a host of constitutional takings concerns. A rebuttable presumption, on the other hand, will not provide any meaningful benefit in terms of improving subscriber access to wiring and will, instead, be used by franchised cable operators for anticompetitive purposes. Although superficially attractive as a means of avoiding detailed factual inquiries, a rebuttable presumption of subscriber ownership would provide franchised cable operators with another opportunity to litigate against and delay property owners seeking to switch service providers. The Commission, therefore, should abandon its proposal to adopt a presumption of subscriber ownership.

## CONCLUSION

For the reasons set forth above, OpTel urges the Commission not to require mandatory access to MDUs and to move the cable demarcation point to the point at which the cable wire becomes dedicated to an individual subscriber's unit. In addition,

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[42] Notice ¶ 48.

OpTel urges the Commission to ensure that the telephone demarcation point is the minimum point of entry into MDUs, both for existing and new buildings.

Respectfully submitted,
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